

*United States Court of Appeals
for the Second Circuit*



**PETITION FOR
REHEARING
EN BANC**

*B
PJS*

76-1483

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1483

UNITED STATES OF AMERICA,
Appellee,

—v.—

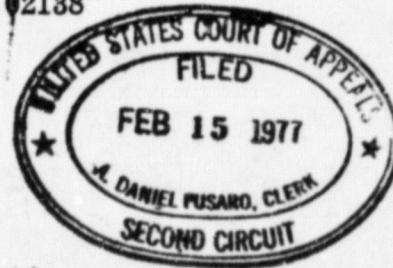
EDMUND A. ROSNER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

**PETITION FOR REHEARING OR REHEARING
IN BANC**

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1483

UNITED STATES OF AMERICA,

Appellee

-against-

EDMUND A. ROSNER,

Defendant-Appellant

PETITION FOR REHEARING OR
REHEARING IN BANC

TO: The Honorable Chief Judge Irving R. Kaufman and
William H. Mulligan and J. Joseph Smith, Circuit Judges
or

The Circuit Judges of the United States Court of Appeals for
the Second Circuit, In Regular Active Service, In Banc.

Edmund A. Rosner, the defendant-appellant above named,
pursuant to F.R. App. Proc. 40, petitions for a rehearing of
the appeal in the above entitled cause, decided February 1,
1977. If this petition is denied by the panel, pursuant to
F.R. App. Proc. 35, we suggest the appropriateness of and
petition for a rehearing in banc.

In support thereof, petitioner respectfully shows the
following:

On February 1, 1977 this court affirmed an order of the United States District Court for the Southern District of New York, Hon. Inzer B. Wyatt, Judge, denying appellant's motion to vacate or correct the sentence imposed on him for his conviction for conspiracy, 18 U.S.C. 371, obstruction of justice, 18 U.S.C. 1503 and 2, and of three counts of bribery, 18 U.S.C. 201(b) and 2, and 3237, United States v. Rosner, Slip op. 1641-1650 (2d Cir. Feb. 1, 1977).

On appeal Rosner argued that the sentence imposed by Judge Wyatt was illegal because in imposing sentence Judge Wyatt took into consideration Judge Bauman's prior sentence which was vacated by this court because Rosner's counsel was not given an opportunity to rebut a presentence memorandum submitted to Judge Bauman by the Government.

This court affirmed, ruling that under the circumstances of this case, as described in its opinion, Judge Wyatt had the discretion to consider Judge Bauman's initial sentence.

Yet, the circumstances described reveal a serious misapprehension of material facts disclosed in the transcript of proceedings before Judge Wyatt on July 1, 1974. The relevant portions of the July 1, 1974 transcript are annexed hereto, with an affidavit of appellant's counsel, Alan M. Dershowitz, sworn to February 7, 1977. In the event the government disputes any material fact in Mr. Dershowitz's affidavit, the case should be remanded for a limited hearing, this court retaining jurisdiction of the appeal. Upon completion of the hearing, the appeal should be referred back to the same panel or the court in banc, for decision. See United States v. Hilton, 521 F.2d 164 (2d Cir. 1975); United States v. Morrell, 524 F.2d 550 (2d Cir. 1975).

The overlooked facts contradict the court's conclusion that "Rosner had every opportunity to controvert the charges of the original government memorandum and to urge Judge Wyatt to abjure reliance on the initial sentence, which might have been based in part on the memorandum," Slip op. at 1647, and that "Rosner's counsel in fact made no effort and sought no opportunity to controvert the contents of the earlier report even though the entire basis for our remand was the previous lack of opportunity for rebuttal," Slip op. at 1646, which are major premises underlying the opinion.

It is incontrovertible that Rosner's counsel urged in his sentencing memorandum that Judge Wyatt abjure reliance on Judge Bauman's initial sentence, which Judge Wyatt explicitly refused to do. (A54, 26-7).

A reading of Mr. Dershowitz's affidavit and the transcript of July 1, 1974, reveal that Rosner and his counsel did seek an opportunity and did make an effort to controvert the contents of the presentence memorandum submitted to Judge Bauman by the Government. However, during the last week in June, 1974, Mr. Dershowitz, Rosner's counsel, received a telephone call from the Assistant United States Attorney in charge of the case, Elliot Sager, who informed him that he had spoken to Judge Wyatt and that Judge Wyatt had stated that he did not want to receive the earlier government sentencing memorandum and that he would not accept any response to that memorandum from the defense. Indeed, at a proceeding on July 1, 1974, when Mr. Dershowitz began to say that "We have been attempting to prepare a rather detailed answer to the Government's brief...,"

Judge Wyatt interrupted him to be assured that it was not a response to the earlier brief filed before Judge Bauman, Transcript of proceedings, July 1, 1974, at pp. 3-4. Judge Wyatt then reiterated his direction on the record:

THE COURT: I think we better just eliminate that as a possible problem, and I just won't consider it. That means that, Mr. Dershowitz -- in fact, I don't know that you have seen it.

MR. DERSHOWITZ: I have seen it, your Honor.

THE COURT: You don't need to respond to it, because I have never seen it, and I don't have it, and I don't want it.

Transcript of proceedings, July 1, 1974, at p. 10.

Judge Wyatt's direction to defense counsel, was, of course, consonant with this court's original mandate remanding this case for resentencing by another judge, which states that: "In resentencing, the Judge redrawn will either not consider the prosecutor's report, or if he deems it desirable to read it, will afford a reasonable opportunity, in advance of sentencing, to defense counsel to attempt to refute its accusations."

United States v. Rosner, 485 F.2d 1213, 1231 (2d Cir. 1973).

It is conceded that Judge Wyatt did not read or depend directly on the initial government memorandum, Slip op. at 1646.

In light of Judge Wyatt's unequivocal directions, we submit that it is a fundamental denial of the due process right of fair notice based upon a serious misapprehension of the true facts for Mr. Rosner to be faulted for "utterly fail(ing)" to "controvert the charges of the original government memorandum and

to urge Judge Wyatt to abjure reliance on the initial sentence, which might have been based in part on the memorandum," Slip op at. 1647, and for having "in fact made no effort and sought no opportunity to controvert the contents of the earlier report even though the entire basis for our remand was the previous lack of opportunity for rebuttal," Slip op. at 1646.

The sentence initially imposed on Rosner was vacated because he was denied an opportunity to rebut the charges contained in the government's initial sentencing memorandum. Certainly, the sentence imposed by Judge Wyatt may have been influenced in part by his further direction not to rebut these charges, which Rosner and his counsel were prepared to do. Under these circumstances, this court should conclude that the new sentence imposed, based in part on the initial sentence ultimately depended on the same improper criteria which vitiating the first sentence and is similarly assailable. Slip op. at 1649; see United States v. Favaloro, 493 F.2d 623,626 (2d Cir. 1974); see also Braniff Airways, Inc. v. Curtiss-Wright Corporation, 424 F.2d 427 (2d Cir. 1970); United States v. Seegers, 433 F.2d 493, 494 (D.C. Cir. 1970); F.R's App. Proc. 40, 35.

Finally, this court's statement that all of the cases cited in appellant's brief are distinguishable because in those cases remand was based upon misinformation and not the lack of opportunity to rebut it, Slip op. at 1645, n.3, is inapposite. Where, as here, the defendant claims that the

allegations of other wrongdoing contained in the prosecutor's memorandum given to Judge Bauman are completely false and unfounded, and defendant and his counsel have been denied an opportunity to controvert these allegations, then for appellate purposes, they must be presumed to be misinformation and thus, the cases cited by appellant are directly in point.

For the foregoing reasons petitioner respectfully requests that this court grant the petition for rehearing and that the order of the district court be, on further consideration, reversed.

Respectfully submitted,

Alan M. Dershowitz

Attorney for Appellant

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Of Counsel:

Elliot A. Taikeff

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New York, New York 10013

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

X
UNITED STATES OF AMERICA,

76-1483

v.

EDMUND ROSNER,

AFFIDAVIT

X
Commonwealth of Massachusetts

County of Middlesex

s.s.:

1. My name is Alan Dershowitz. I am an attorney practicing in Massachusetts. I have been Edmund Rosner's attorney since April, 1973, and I represented him at his sentencing proceedings before Judge Inzer Wyatt on July 1, 1974 and August 16, 1974.

2. I have read the opinion of the United States Court of Appeals for the Second Circuit rendered on February 1, 1977.

3. That opinion contains the following statement:

"Rosner's counsel in fact made no effort and sought no opportunity to controvert the contents of the earlier report even though the entire basis for our remand was the previous lack of opportunity for rebuttal. It may well be that this reticence was strategically sound since any further exploration of the charges it made might have exacerbated the posture of his client."
Typescript at p. 5.

That statement is not factually correct. In fact, I did seek an opportunity and did make an effort to contravert the contents of the earlier report. It was our intention -- both Mr. Rosner's and mine -- to rebut each and every one of the charges contained in the earlier report. But during the last week in June, 1974, I received a call from the Assistant United States Attorney in charge of the case, Elliot Sagor, who informed me that he had spoken to Judge Wyatt and that Judge Wyatt had stated that he did not want to receive the earlier government sentencing memorandum and that he would not accept any response to that memorandum from the defense. Indeed, at a proceeding on July 1, 1974, when I began to say that "We have been attempting to prepare a rather detailed answer to the Government's brief....," Judge Wyatt cut me off to be assured that it was not a response to the earlier brief filed before Judge Bauman. Judge Wyatt then reiterated his direction on the record:

THE COURT: I think we better just eliminate that as a possible problem, and I just won't consider it. That means that, Mr. Dershowitz -- in fact, I don't know that you have seen it.

MR. DERSHOWITZ: I have seen it, your Honor.

THE COURT: You don't need to respond to it, because I have never seen it, and I don't have it, and I don't want it.

Transcript of July 1, 1974 at p. 10.

4. In light of these unequivocal directions, it is --

in my view -- a fundamental denial of the due process right of fair notice for Mr. Rosner (and his counsel) to be faulted for "utterly fail[ing]" to "contravert the charges of the original government memorandum and to urge Judge Wyatt to abjure reliance on the initial sentence, which might have been based in part on the memorandum". Typescript at p.6. I, as counsel for Mr. Rosner, did everything humanly possible -- every single thing I could conceivably have done consistent with the court's directions -- to contravert the charges and to urge Judge Wyatt not to consider them or the original sentence.

5. The court's suggestion that "It may well be that this reticence was strategically sound since any further exploration of the charges it made might have exacerbated the posture of his client" (typescript at p. 5) is without any basis in fact. Both Mr. Rosner and I affirmatively wanted an opportunity to contravert the charges. Indeed, I had checked out several of the charges and found them to be unfounded or grossly exaggerated.

6. In light of the fact that Mr. Rosner and I were denied the opportunity to contravert these charges, it is difficult to understand how it can be said that "there has been a total failure to establish that Judge Bauman

did rely on information which was in fact false". (Typescript at p. 6.)

7. Footnote 1 of the opinion contains the following criticism of my conduct:

"When sentenced by Judge Wyatt on August 16, 1974 the government did not oppose his continuance on bail on the representation of Rosner's attorney that an appeal from his sentence would be filed 'as expeditiously as possible'. The motion to vacate the sentence was not made until more than two years later -- September 26, 1976."

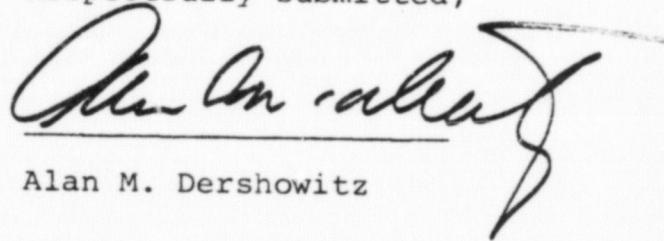
Typescript at p. 9.

A reading of the transcripts of July 1, 1974 and of August 16, 1974 reveals that the quoted words are taken out of context. The day prior to the sentencing, Judge Bauman had denied Mr. Rosner's new trial motion. My representation to the government -- made prior to the sentencing proceeding -- was that I would file the appeal from the denial of the new trial motion as expeditiously as possible. I did file such an appeal immediately. Obviously I made no representation that I would appeal from the sentence, since at the time I made the representation to the government, I did not know what the sentence would be and I certainly did not know that Judge Wyatt would take into consideration Judge Bauman's sentence.

8. Accordingly, in addition to the relief requested in the motion, I respectfully request that the opinion be corrected to eliminate this and other factual misstatements

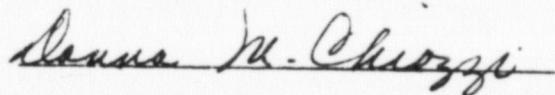
which reflect negatively on my competence, diligence and professional responsibility.

Respectfully submitted,



Alan M. Dershowitz

Sworn to before me this
7th day of February, 1977.



Dennis M. Chioggi

2 request or the defendant's request, and we have been preparing
3 and I can tell you, your Honor, literally twenty hours
4 a day for this evidentiary hearing.

5 Even this morning's Times revealed three new items
6 we did not know of until now, and I have to investigate two
7 of them.

8 This morning, the Government filed with us a
9 brief in which a major new factual development was indicated.
10 For the first time, we were told that a United States
11 Attorney, Mr. Shaw, had specific knowledge that Leuci had
12 admitted to one particular crime which he then denied on the
13 witness stand.

14 This morning we were served with two rather lengthy
15 documents to read in preparation for our hearing this morning.

16 It simply is not possible for us to take time out
17 of this hectic schedule and prepare for a sentencing pro-
18 ceeding. I came into the case after the sentencing pro-
19 ceeding before Judge Bauman, and I am not familiar with the
20 recent details of Mr. Rosner's activities, his life, and I
21 am not familiar with the kinds of material I am sure your
22 Honor would like to hear before imposing sentence.

23 We have been attempting to prepare a rather de-
24 tailed answer to the Government's brief --

25 THE COURT: You mean the Government's brief before

1 RMP

4

2 Judge Bauman?

3 MR. DERSHOWITZ: No. Before your Honor. Your
4 Honor received a brief from the Government several months
5 ago, when the case was originally set.

6 THE COURT: That is this sentencing memorandum?

7 MR. DERSHOWITZ: Yes. We would like to bring to
8 your Honor's attention the sentencing statistics and data
9 for this Circuit and other Circuits involving bribery.

10 When we learned, just a few days ago, that this
11 had been set again for this Tuesday, which caught me by
12 complete surprise, we simply had no opportunity to update
13 the memo and put it in final form, and I am not prepared --

14 THE COURT: There should not be any mystery about
15 how it got set for sentence tomorrow. The United States
16 Attorney's office suggested to me that it was appropriate,
17 in light of the disposition in the Supreme Court, to set
18 the matter for sentence. I had not, *sua sponte*, done any-
19 thing, of course, and I responded to the United States
20 Attorney's suggesting by setting it for tomorrow, that being
21 a day or two before I am leaving for a vacation.

22 MR. DERSHOWITZ: By all means. Our complaint,
23 if there is one, with the Government is that we wish, in
24 light of the fact that this is a very contested, on-going
25 litigation, we had received some notice of the Government's

2 THE COURT: While we are gathered, let me ask you
3 gentlemen this:

4 When I have read and studied the Court of Appeals
5 opinion, apparently one of the reasons for remanding the
6 sentence was because the sentencing Judge had received a
7 sixteen-page memorandum from the United States Attorney's
8 office, and the defendant or his counsel had not been given,
9 as I understand it, adequate time to respond to that.

10 Now, I have not received that sixteen-page memoran-
11 dum, and I see no reason why I should receive it.

12 Is the Government in agreement with me that I
13 don't need that memorandum?

14 MR. SAGOR: We will follow the guidance of the
15 Court on that score, your Honor.

16 [THE COURT: I think we better just eliminate that
17 as a possible problem, and I just won't consider it.
18 That means that, Mr. Dershowitz -- in fact, I don't know
19 that you have seen it.

20 MR. DERSHOWITZ: I have seen it, your Honor.

21 THE COURT: You don't need to respond to it, because
22 I have never seen it, and I don't have it, and I don't want
23 it.]

24 Then I guess that takes care of our business here
25 this morning, and I will see you gentlemen, hopefully, God

Reed
J. Reed
2/15/77



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